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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 560

EARLE W. HILTON, *Petitioner*

v.

JOHN L. SULLIVAN, Secretary of the Navy, and FRANCES PERKINS, HARRY B. MITCHELL, ARTHUR FLEMMING, Members of the Civil Service Commission, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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January, 1948.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Earle W. Hilton, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled cause on December 29, 1947.

Opinion Below.

The opinions of the United States District Court (R. 52) and the United States Court of Appeals (R. 54) for the District of Columbia have not been officially reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia was entered on December 29, 1947 (R. 57). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Sec. 347 (a).

Questions Presented.

1. Whether the regulations for reduction-in-force in Federal Government employment, as here applied, may be upheld as a valid exercise of discretion under Section 12 of the Veterans Preference Act, notwithstanding that they were established by the Civil Service Commission in the mistaken belief they were required by law.

2. Whether the "superseniority" granted veterans of World War II in Federal Government employment for one year after return from military service, in preference to all other employees, veteran or non-veteran, with permanent tenure, is required or authorized by Section 8 of the Selective Service Act.

3. Whether the regulations of the Civil Service Commission for reduction-in-force in Federal Government employment, as here applied, are required or authorized by Section 12 of the Veterans Preference Act.

Statutes and Regulations Involved.

Section 12 of the Veterans Preference Act of 1944 (Act of June 27, 1944, c. 287, 58 Stat. 390, 5 U. S. C. Supp. V, Sec. 861) provides as follows:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations, which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited

in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions".

Section 8 of the Selective Training and Service Act of 1940 (Act of September 16, 1940, c. 720, 54 Stat. 890, 50 U. S. C. App. Sec. 308), as amended, provides:

"...

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service . . . —

"(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; . . .

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be

> entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration".

Section 6 of the Act of August 24, 1912 (37 Stat. 555, 5 U. S. C. Sec. 652) provides:

> "No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service. . . ."

The pertinent sections of the reduction-in-force regulations of the United States Civil Service Commission promulgated under Section 12 of the Veterans Preference Act of 1944 and applied herein (5 CFR (1945 Supp.) §12.301 *et seq.*) are set forth *infra*, p. 5.

Statement.

Petitioner was employed in the United States Navy Yard at Charleston, South Carolina, with permanent status in the classified civil service (R. 4). On January 7, 1946, he was demoted from his position of Shipfitter, Leadingman at $12.08 per diem, to Shipfitter, Maximum at $10.08 per diem (R. 4), and on November 8, 1946 was furloughed without pay for a period of one year in consequence of reductions of personnel in the Navy Yard carried out in accordance with regulations of the United States Civil Service Commission (R. 23). Petitioner had rendered more than twelve years of service as a skilled workman in the shipfitters shop at this Yard, and had an efficiency rating of "Excellent" (R. 5, 11). He was not entitled to preference on account of military service (R. 11).

The regulations of the Commission covering reductions in force provide that employees in each "competitive level" shall be divided into three "retention groups" based upon the nature of their tenure of employment, as follows:

Group A, employees who have met all requirements for indefinite retention in present positions;

Group B, employees serving under appointments with a time limitation which exceeds one year;

Group C, temporary employees serving under appointments with time limitations of one year or less (Sec. 12.303).

Each such group is then divided into subgroups according to military service and—except for sub-group A-1 Plus—efficiency rating. Group A is accordingly subdivided as follows:

"A-1 Plus. During one-year period after return to duty, as required by law.

"A-1 With veteran preference unless efficiency rating is less than 'Good'.

"A-2 Without veteran preference unless efficiency rating is less than 'Good'.

"A-3 With veteran preference where efficiency rating is less than 'Good'.

"A-4 Without veteran preference where efficiency rating is less than 'Good'." (*Id.*)

Within each of these subgroups employees are assigned retention credits by allowing one point for each full year of Government service (including military service), and five additional points for an "excellent" efficiency rating (Sec. 12.302(c)).[1] Employees are listed in their respective subgroups in the order of total number of retention points. Reductions in force are made by starting with the lowest subgroup, that is, Subgroup C-4, and eliminating in inverse order of the number of their retention credits. All employees in a lower sub-group must be eliminated before

[1] Effective Sept. 15, 1946, 3 points were added for an efficiency rating of "very good", and 1 point for "good". Regulations, Sec. 20.2(c), 12 F. R. 1291 (Feb. 25, 1947).

those in the next higher sub-group are reached (Secs. 12.307, 12.308).

Petitioner was placed in Sub-group A-2 on the retention registers (R. 22, 31). At the time of his furlough without pay, the regulations gave higher retention priority to 57 employees in sub-group A-1 (R. 29-30) and 118 employees in sub-group A-1 Plus (R. 26-29). Of those in sub-group A-1 Plus, 2 were listed with efficiency ratings of "excellent" (R. 26), 54 were "good" (R. 26-28), and 61 were listed "no efficiency" (R. 28-29). Non-veterans with ratings of "no efficiency" were placed below sub-group A-2 on the register, and therefore furloughed before petitioner was reached (R. 33).

Petitioner brought this action in the United States District Court for the District of Columbia, for a declaratory judgment that the regulations as applied to him were beyond the scope of respondents' authority, and for other relief (R. 3). After answer (R. 7), both petitioner and respondents moved for summary judgment on the ground that no genuine issue as to any material fact was presented and that judgment be given as a matter of law (R. 10, 52). The District Court denied the motion by the petitioner, and granted summary judgment for the respondents (R. 53), based on a memorandum opinion that the regulations complained of were consistent with the purpose, letter and spirit of the Veterans Preference Act (R. 52). Final order was entered May 9, 1947 (R. 53). On appeal the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court (R. 57). Its opinion declared that the Commission's regulations were not the only possible method of applying the Act, as the Commission had contended, but nevertheless were not an unreasonable application of the discretion vested in that agency by the Act (R. 56).

Specification of Errors to be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that sub-groups A-1 Plus and A-1 of the regulations for reduction-in-force of Federal Government employees as here applied were within the discretion of respondents civil service commissioners, and in affirming the judgment of the district court upon that ground, notwithstanding that respondents established those sub-groups in the mistaken belief they were required by law.

2. In failing to hold that sub-groups A-1 Plus and A-1 of the reduction-in-force regulations as here applied were not required by either the Selective Service Act or the Veterans Preference Act, and in failing to invalidate those sub-groups on the ground they had been established by respondent civil service commissioners in the mistaken belief they were respectively required by those laws.

3. In holding that Section 12 of the Veterans Preference Act required or authorized sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans were retained in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that Navy Yard, veteran or non-veteran, regardless of efficiency ratings or seniority.

4. In holding that Section 12 of the Veterans Preference Act required or authorized sub-group A-1 Plus of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby veterans with ratings of "no efficiency" were retained as shipfitters in the Charleston Navy Yard during a one-year period following restoration to employment after military service, in preference to petitioner and all other shipfitters in that

Navy Yard, veteran or non-veteran, regardless of their higher efficiency ratings and greater seniority.

5. In holding that Section 12 of the Veterans Preference Act of 1944 required or authorized sub-group A-1 of the regulations for reduction-in-force of Federal Government employees with civil service tenure, whereby shipfitters who are veterans with efficiency ratings of "good" or better were retained in the Charleston Navy Yard in preference to petitioner and other shipfitters in that Navy Yard who are non-veterans but had higher efficiency ratings and greater seniority.

6. In affirming the judgment of the district court denying petitioner's and granting respondents' motion for summary judgment.

7. In failing to reverse the judgment of the district court, with direction for appropriate relief based on the invalidity of the regulations as here applied.

Reasons for Granting the Writ.

I.

In upholding the absolute retention priority of employees in sub-group A-1 Plus, as a matter of law or discretion, the court below decided an important question under the Selective Service Act and the Veterans Preference Act, and failed to give proper effect to applicable decisions of this Court.

a. The regulations in question grant the maximum priority, or "super-seniority", to World War II veterans, in preference to other veterans as well as all non-veterans, "during one-year period after return to duty, as required by law" (Sub-group A-1 Plus, Sec. 12.303). It is plain that the Commission established this sub-group as a matter of law rather than discretion, and that the "law" referred to is other than Section 12 of the Veterans Preference Act. The Commission has informed the Attorney General that

"at the time the A-1 Plus category was established, that action was regarded as required by the provisions of section 8" of the Selective Training and Service Act. 40 *Op. Atty. Gen.* No. 115 (Sept. 20, 1946) p. 4. To the same effect are *62nd Annual Report of the Civil Service Commission* (1945) p. 20; *Federal Personnel Manual* (U. S. Civil Service Commission), R. 6-2.

Thus, the Commission has predicated sub-group A-1 Plus upon the supposed requirements of the Selective Service Act rather than upon any supposed discretionary authority stemming from the Veterans Preference Act. Nevertheless the court below sustained sub-group A-1 Plus upon the opposite grounds; namely, that it was discretionary under the statute, although not "the only possible method" of applying it (R. 56). It is submitted that the court below erred in not confining itself to the validity of the mandatory ground upon which the Commission itself rested its action, since the agency has misconceived the law rather than exercised its judgment in an area which Congress had entrusted to it. See *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 88, 94-5; *cf. United States* v. *Carolina Carriers' Corp.*, 315 U. S. 475, 488-9. It is submitted that this error calls for review by this Court to determine the important question otherwise left unresolved, whether sub-group A-1 Plus is required by law; and that if not required by law, that sub-group should be set aside regardless of whether it might be sustained were it the product of the exercise of permissible discretion. *Id.; Securities & Exchange Commission* v. *Chenery*, 332 U. S. 194.

b. That sub-group A-1 Plus is not required by the Selective Service Act is obvious from applicable decisions of this Court, which have rejected respondents' contention that the Act grants veterans such extraordinary retention privileges or "super-seniority" when a bona fide reduction in force becomes necessary during the first year following their return to duty after honorable discharge from military service. While the Selective Service Act is to be liber-

ally construed for the benefit of veterans, it did not intend to grant a step-up or gain in priority over what the veteran would have had if he had never entered the armed forces. *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 285-289. The *Fishgold* case affords no basis for respondents' argument below that the principle established should be limited to very brief layoffs comparable to the nine-day periods there involved, and in no event longer than 30 days, which is the minimum for operation of the Commission's reduction-in-force regulations.[2]

The subsequent opinion in *Trailmobile Company* v. *Whirls*, 331 U. S. 40, reiterated that the job guarantee for the statutory period did not apply to a veteran who "simply had been deprived of the opportunity to work by operation of the seniority system when there was not sufficient work for both himself and other employees with greater seniority after he had been accorded his full standing under the Act". 331 U. S. at 56. The contention for super-seniority within the statutory period was deemed on a par with that for statutory protection beyond one year. The Court did not believe that Congress had in mind such far-reach-

[2] The Attorney General has ruled that Section 8 of the Selective Service Act requires the reinstatement and retention of a returning veteran for one year, even in preference to other veterans of World War II with greater seniority. 40 Op. Atty. Gen. No. 115 (Sept. 20, 1946). His opinion assumes that "underlying the reduction in force regulations is a determination by the Civil Service Commission that 'separation' or 'furlough for over thirty days' are actions constituting a 'discharge'." (p. 7.) This conclusion is contrary to the clear distinction between being placed on "furlough status" for one year and being "separated in reduction of force", drawn under the *Fishgold* decision (328 U. S. at 286-7), the regulations of the Civil Service Commission (Sec. 12.309 (a)), and the notice of the Navy Department herein (R. 23-24). For example, unlike the employee absolutely separated, the furloughed employee in sub-group A-1 or A-2 is placed on a preference list for reinstatement before any original appointments may be made to such positions; and he may not receive a refund of his retirement deductions. More recent regulations make mandatory the one-year notice rule for furloughed employees in sub-groups A-1 and A-2. Sec. 12.309(a), 12 F. R. 59 (Jan. 4, 1947.)

ing consequences for the nation-wide system of employment, both *public and private*, when making statutory provisions for the veteran's benefit''. 331 U. S. at 57 (italics supplied).

For purposes of the instant case, petitioner's superior retention rights by operation of law have the same effect as the non-veterans' superior seniority rights under private contracts in the cases cited. See *Trailmobile Company* v. *Whirls*, *supra*, 331 U. S. at 53, note 21.

c. The result is no different even assuming that respondents may properly urge here the validity of sub-group A-1 Plus under Section 12 of the Veterans Preference Act, as a matter of law or discretion. In establishing sub-group A-1 Plus, the Commission ignored completely the requirement of that section that ''due effect'' be given length of service and efficiency, along with tenure and military preference. And whatever may be the scope of the second proviso (pp. 13-20, *infra*), it is assuredly based on elements of comparative efficiency which were likewise ignored by the Commission in placing all returned veterans in sub-group A-1 Plus for one year. Shipfitters who were veterans in sub-group A-1 Plus were given retention rights superior to all other shipfitters in the Charleston Navy Yard, whether veterans in sub-group A-1 or non-veterans in sub-group A-2, regardless of the ''excellent'' or ''good'' efficiency ratings of all the employees in the latter sub-groups, and the higher seniority of many of them, including petitioner (R. 28-33).

Apart from the validity of sub-group A-1 Plus as a whole, there was no statutory authority for placing in that category 61 employees with ratings of ''no efficiency'' (R. 28-29). Non-veterans with ratings of ''no efficiency'' were placed below sub-group A-2 on the register (R. 32), and hence were furloughed before petitioner and others in his sub-group were reached. And on respondents' own construction, Section 12 at best gives absolute preference in retention to veterans with efficiency ratings of ''good or

better", and also at best gives veterans with efficiency ratings below good, absolute preference over non-veterans with equal or lower ratings.

Sub-group A-1 Plus as here applied thus finds no support either in the requirements of Section 12 of the Veterans Preference Act or in any supposed discretion flowing therefrom.

II.

In upholding the retention priority of employees in sub-group A-1 in the reductions-in-force herein, the court below erred in deciding a question of general importance relative to the Veterans Preference Act which has not been, but should be, settled by this Court.

a. Sub-group A-1 was not required by law, as the Commission believed when establishing its regulations. Respondents brief below argued that "Congress . . . did not see fit to allow the Commission any administrative latitude in this matter. It has expressly and explicitly prescribed the exact effect which shall be accorded military preference" by the second proviso to Section 12, which is said to "command" the establishment of sub-group A-1.[3] But this

[3] The absolute preference accorded military service is in marked contrast to the flexibility evidenced by the Commission in determining the relative weight given length of service and efficiency. The regulations first issued under the Act gave 1 retention credit for each year of service, plus points for efficiency weighted at 80 for "good"; 88 for "very good", and 96 for "excellent". Thus "an employee with a rating of 'very good' has an advantage over a 'good' employee equal to 8 years of seniority. An 'excellent' employee has an advantage over a 'good' employee equal to 16 years of seniority". See *Questions and Answers on New Reduction-in-Force Regulations*, U. S. Civil Service Commission Release (Aug. 8, 1944); Departmental Circular No. 510, Sec. 2 (Nov. 15, 1944), 9 F. R. 13699. Increased weight was later given to length of service in relation to efficiency, by allowing one point for each year of service plus 5 points for "excellent" efficiency rating. Regulations, Sec. 12.302(c), 10 F. R. 12181 (Sept. 27, 1945). This was in turn amended by adding 3 points for efficiency ratings of "very good" and 1 point for "good". Regulations, Sec. 20.2(c), 12 F. R. 1391 (Feb. 25, 1947).

construction of the second proviso assumes the conclusion, which turns, as the court below recognized (R. 56), on the scope given the phrase "all other competing employees," in relation to "military preference."

Section 12 of the Veterans Preference Act requires that the Commission's regulations on reductions-in-force shall give "due effect", not to military service alone, but to *four* factors: "tenure of employment, military preference, length of service, and efficiency ratings". The persons accorded "military preference" are enumerated in Section 2, but the weight accorded that "preference" is defined and qualified in subsequent sections.

"Preference eligibles" are entitled to 5-point and 10-point differentials to be added to their earned ratings, except certain categories in the professional and scientific services (Sec. 3), and to be listed for appointment, reinstatement and reemployment in the order of their augmented ratings "ahead of all others having the same ratings". (Sec. 7, 15, 16). "Preference employees" are affected in two ways under Section 12: In transfers of function from one agency to another, the third proviso requires that they are transferred to the second agency "for employment in positions for which they are qualified", before "additional employees" are appointed "from any other source"; thus they cannot displace non-veterans already employed in the second agency. In event of reductions-in-force, the precise definition of the preference accorded is likewise established. By the first proviso, the length of time on active duty must be credited in computing total service for seniority purposes. By the second proviso, the weight to be given the factor of efficiency is qualified so as to equate a veterans rating of "good" with a competing non-veteran's rating of "good" or better. The factor of tenure lends itself readily to classification. The added retention credits accorded "preference employees" will thus depend upon the relative weight given length of service and efficiency ratings, and the manner of their classification or

grouping. Only those employees falling within a particular classification or group would be "competing" for purposes of the second proviso, as the opinion below points out (R. 56). In this way, we "construe the separate provisions of the Act as parts of an organic whole, and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits". *Fishgold* v. *Sullivan Dry Dock & Repair Co.*, 328 U. S. 275, 285.

Section 12 thus provides on its face standards whereby the four enumerated factors shall be given reasonable effect in combination. In no circumstances can the Section be read to authorize the regulations actually issued and applied, which give "military preference" in reductions-in-force an absolute effect accorded by the statute in none of the other situations enumerated above. Where Congress intended that veterans be given absolute preference under this Act, it used plain words manifesting that intention; for example, in the proviso to Section 3 whereby, in examinations for guards, elevator operators, messengers, and custodians "competition shall be restricted to persons entitled to preference under this Act as long as persons entitled to preference are available". Congress recently declined to accept comparable language in Section 12 eliminating the requirement for "due effect" to efficiency and seniority, and subordinating them entirely to military service.[4]

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[4] H. R. 739, 80th Cong. 1st Sess., as introduced Jan. 9, 1947, read as follows: "Whenever reductions in personnel, reductions in grade, or demotions are necessary in any Federal agency, employees shall be released, reduced, or demoted on an agency-wide basis in accordance with Civil Service Commission regulations which shall give effect to the following categories in the order listed: First to military preference; second, to tenure of employment; third, to length of total Federal service; and, fourth, to efficiency ratings: . . . *Provided further*, That regardless of the above categories veterans-preference employees shall be retained in any Federal agency over all other employees: *Provided further*, That employees having equal standing in any of the above categories shall be released upon the basis of their relative standing in the next lower category: *Provided further*, That the length of

The court below expressly controverted the Commission's view that "the regulations as drawn represent the only possible method of applying the statute" (R. 56). Congress did not mean to foreclose the Commission, the court said "by unequivocally requiring that veterans, regardless of length of service, be retained over non-veterans, regardless of length of service; or that comparatively inexperienced veterans compose the reduced federal force in preference to experienced non-veteran personnel" (R. 56). Thus the administrative agency here, as in *Securities and Exchange Commission* v. *Chenery case*, 318 U. S. 80, erred in basing its action on supposed compulsion of law. It is submitted therefore that the Commission's action cannot be sustained on appeal; since here as in subgroup A-1 plus, the agency has misconceived the law rather than exercised its judgment in an area which Congress had entrusted to it, *Supra* p. 9.

b. The Commission's regulation establishing sub-group A-1 misapplied the standards governing its discretionary authority.

The Veterans Preference Act, known as the Starnes-Scrugham Law, was the outcome of years of Congressional consideration. The version introduced by Congressman Starnes as late as 1943 required that in any reduction-in-force, employees within each classification to be reduced shall be released in the "inverse order of the length of their total federal service", the time spent in the armed forces being included in computing length of service (H.R. 882, 78th Cong. 1st Sess. Sec. 12). This was amended in the 1944 bill to conform substantially to the present language (H.R. 4115 and S. 1762, 78th Cong. 2nd Sess.), because the

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time spent in active service in the armed forces of the United States of each such Federal employee shall be credited in computing total length of Federal Service." As reported by the House Committee on Post Offices and Civil Service on July 16, 1947, and approved by the House, this language was amended to make only minor variations from existing law. Cong. Rec. (July 21, 1947) p. 9754.

Civil Service Commission advised the House sponsor and the House Committee it "does not believe that reductions in force should be made solely on the basis of length of service, but that consideration should also be given to the relative efficiency of the employee".[5]

The statute clearly provides standards whereby these two elements are to be considered and weighed in combination with tenure and military service. *Supra*, p. 13-14; *Cf. Packard Motor Car* v. *National Labor Relations Board*, 330 U.S. 485, 492. In no event does the relevant legislative background support respondent's construction of Section 12 in regard to sub-group A-1.[6] Respondents main reliance is on pre-existing statutes, executive orders or administrative regulations. These are of no avail, for the Act as a whole represents the first Congressional effort to write comprehensive legislation on the subject, and contains many changes from earlier practices[7]—changes which supersede all previous acts and parts of acts by virtue of Section 18. Respondent Sullivan has himself emphasized the "radical" differences in employment conditions and management policies brought about by the Commission's regulations in purported compliance with Section 12 of the Act (R. 35). The saving clause of Section 18 is inapplicable to reductions-in-force under Section 12, since it is de-

[5] Letter to Hon. Joe Starnes, Jan. 31, 1944, Press Release, U. S. Civil Service Commission, Feb. 2, 1944; H. Rpt. 1289, 78th Cong. 2nd Sess. (1944) pp. 5-6.

[6] See H. Rep. 1289 *supra*, pp. 4, 6; S. Rep. 907, 78th Cong. 2d Sess. (1944) p. 3. See also Hearings on S. 1762 and H. R. 4115, Committee on Civil Service, U. S. Senate (1944) p. 29.

[7] H. Rep. 1289, *supra*, p. 3. For example, Section 3 of this Act goes beyond pre-existing law by granting veterans absolute preference in certain employments. On the other hand, regardless of the Act of August 23, 1912 (37 Stat. 413), for example, Section 12 as currently construed by the Civil Service Commission does not afford veterans any preference against demotion, and does not prefer veterans with temporary or war service tenure over non-veterans with indefinite tenure. See also *62nd Annual Report of the United States Civil Service Commission* (1945) pp. 57-8.

signed merely to protect the standing of "peacetime soldiers" under pre-existing law and regulations.[8] The historical background of the statute thus gives no more support to the erroneous administrative construction of the Veterans Preference Act than did similar attempted analysis of the Selective Service Act in the *Fishgold* case. 328 U.S. at 289-290.

We are not confronted here with a borderline case in which veterans are preferred over non-veterans only slightly superior in seniority or efficiency. Petitioner had been employed in the Charleston Yard for twelve years and was rated "excellent" in efficiency (R. 5). He stood near the top of sub-group A-2 (R. 31), and had more retention credits than 131 other shipfitters out of 143 in subgroups A-1 and A-2 combined (R. 29-32). The bulk of the veterans retained had lower efficiency ratings and substantially lower seniority, even after crediting toward total length of service the years spent on active duty (R. 29-32).

Employment in the Charleston Navy Yard had increased from 7,000 in 1938 to 27,500 at the peak of war activity (R. 12). Before the war service regulations were instituted in 1942, only a six-months probationary period was required under Civil Service Rule VII 2(c) to establish permanent tenure for purposes of the present reduction-in-force regulations. Most of the new employees had not had the specialized knowledge to perform the skilled tasks of building, repairing, or maintaining naval war ships in the Yard during the war period. Approximately 85% of the employees now accorded "veterans preference" were without prior experience in shipbuilding, and were trained by the career civil service employees whom they have now displaced under the regulations here involved (R. 12). Only 2 of the veterans in subgroup A-1 Plus had ratings of "Excellent" (R. 26).

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[8] S. Rep. 907, *supra*, p. 2; H. Rep. 1289, *supra*, p. 3; Hearings on S. 1762 and H. R. 4115, Committee on Civil Service, U. S. Senate (1944) pp. 17, 60.

Experience throughout the Navy Yards emphasizes the serious impact of the Commission's regulations on efficiency of the service, particularly in the present period of international tension. The end of hostilities left the Navy with a gigantic and far-flung shore establishment approximately fifteen times larger than that existing in 1940. Within one year, civilian employment in the Navy Yards was reduced from 355,000 to 158,000 men. *Annual Report of the Secretary of the Navy* (1946) pp. 40, 35. Respondent Sullivan took occasion to stress the adverse consequences of the Commission's regulations under the Veterans' Preference Act (R. 45-46).

This outcome was never intended by Congress. It results from the Commission's regulations rather than the Act itself. It need not have occurred if the Commission had correctly construed the statutory standards for reductions-in-force as requiring a middle course, rejecting sole reliance on either seniority or military service, in line with Congressional rejection of the 1943 and 1947 veterans' preference bills based on these factors. *Supra*, pp. 14, 15.

Such a construction of Section 12 of the Veterans Preference Act is in harmony with the comprehensive post-war program developed by the Federal Government for the millions of World War II veterans, embracing aids toward employment and unemployment insurance, formal education, technical training, home or farm ownership and independent small business.[9] All are part of a broad-gauged plan framed so far as humanly possible to establish the veterans as citizens in a healthy national economy, but not as a group set apart from the general national interest.

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[9] See 58 Stat. 284, 38 U. S. C. Sec. 693; Statement by the President on Signing Servicemen's Readjustment Act (June 22, 1944); H. Doc. 361 Message from the President, *Post-War Benefits to Veterans of the Armed Forces*, 78th Cong. 1st Sess. (1943); H. Doc. 344, Message from the President, *Post-War Educational Opportunities for Service Personnel*, 78th Cong. 1st Sess. (1943); *Demobilization and Readjustment*, Report of the Conference on Post-War Readjustment of Civilian and Military Personnel (National Resources Board, 1943).

These principles are especially appropriate here. The importance of the Navy Yards in the war effort requires no elaboration, and it is common knowledge that all available governmental authority and persuasion were invoked to provide and maintain efficient civilian manpower for the critical tasks of shipbuilding and repair. Draft deferment policy was designed to retain personnel in direct order of usefulness for the civilian job to be done in aid of the armed forces afloat or in the field.[10] Those very highly skilled men who in wartime were held in the shipyard rather than inducted into the armed forces, or who, like petitioner, were beyond military age (R. 11), are being re-

[10] At the outset of the war, the Selective Service Administration emphasized its responsibility for occupational classification. A policy statement to local boards read in part: "It is the responsibility of the Selective Service System to allocate the manpower of the Nation among the armed forces, civilian activities necessary to war production, and other civilian activities essential to the support of the war effort . . . Thus the Selective Service System, through the process of classification, must do its part to accomplish an orderly adjustment of the manpower resources of the Nation, so that all available men will properly and expeditiously be directed into that channel of activity where the Nation at war will be best served." *Local Board Memoranda, Selective Service System, 1941-1945* (1945), Release 115, March 16, 1942. Shipfitting was listed as a critical occupation in the essential shipbuilding and repair industry, on the lists compiled by the War Manpower Commission. *Id.*, as amended Aug. 16, 1943. The "necessary man" in a critical occupation was defined as one having the requisite degree of training, qualification or skill, who could not be replaced because of an existing shortage of trained manpower, and whose loss would seriously impair the effectiveness of the war activity engaged in. *Id.* as amended Aug. 16, 1943, Jan. 6, 1944. Government employees were subject to the foregoing standards, plus the requirement that their deferment be requested by the head of the agency involved. *Id.*, Release 115-F; *Selective Service in Wartime* (1943), pp. 219-222, 162-3, 165. A government employee attempting to volunteer for military service was denied release if the appropriate agency committee had requested or would request his deferment under the foregoing standards, unless the employee was likely to be assigned to combat duty, or his skill and ability probably would be utilized equally or more effectively in the armed forces. Executive Order 9309, Part V (Mar. 6, 1943), 50 U. S. C. App. foll. Sec. 305a.

placed under erroneous regulations of the Civil Service Commission which it is submitted Congress never authorized. Such action is harmful to the national defense as well as to the national economy and well-being and the civil service. *Cf.* Sec. 6, 37 Stat. 555, 5 U. S. C. Sec. 652. The regulations issued contravene the legislative intent to give appropriate weight to efficiency, seniority and tenure in relation to military service. *Cf. Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 616-617; *West* v. *Chesapeake and Potomac Telephone Co.*, 295 U. S. 662, 678-680; *St. Louis and O'Fallon Ry. Co.* v. *United States*, 279 U. S. 461, 487.

The public interest will be promoted by settlement in this Court of the important questions involved. It is submitted that subgroups A-1 Plus and A-1 of the Commission's reduction-in-force regulations as here applied are based upon erroneous interpretation of the Commission's authority under the Statute, and are for the reasons stated otherwise invalid. The court below accordingly erred in failing to reverse the judgment of the district court and to direct a remedy appropriate in the circumstances. *Cf. Holly Hill Fruit Products Co.* v. *Addison*, 322 U. S. 607, 619-623.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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